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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 552

MID-STATES FREIGHT LINES, INC., et al.,
Petitioners,

against

SPENCER E. BATES, et al., etc.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

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HERBERT BURSTEIN,
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On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. .....

MID-STATES FREIGHT LINES, INC., H. L. F. McBRIDE, ONEIDA MOTOR FREIGHT, INC., MIDDLE ATLANTIC TRANSPORTATION CO., INC., A. B. & C. MOTOR TRANSPORTATION CO., INC., A. C. E. TRANSPORTATION CO., INC., ACME TRANSFER & STORAGE CO., INC., AKERS MOTOR LINES, INCORPORATED, THE AKRON-CHICAGO TRANSPORTATION COMPANY, INC., ALL STATES FREIGHT, INC., AMERICAN FREIGHTWAYS COMPANY, AMSTERDAM DESPATCH, INC., ARROW TRANSPORTATION CO., INC., ASKIN TRUCKING COMPANY, INC., ASSOCIATED TRANSPORT, INC., GEORGE T. AWE, BERNARD BRADLEY & CHARLES ROMANO d/b/a B. & R. TRUCKING CO., B. & R. TRUCKING COMPANY, BALTIMORE-NEW YORK EXPRESS, INCORPORATED, BERNIE'S EXPRESS, INC., HARRY A. BLADES, INC., BORO EXPRESS & TRANSFER CO., INC., ANNA BRADLEY d/b/a BRADLEY'S EXPRESS, BROOKLYN TERMINAL STORES, INC., BUCH EXPRESS, INC., BUFFALO DELIVERY, INC., BURG TRUCKING CORPORATION, JAMES BURKE, R. A. BYRNES, INCORPORATED, C. & J. TRUCKING CO., P. CALLAHAN, INC., CANNY TRUCKING CO., INC., FRANK J. CANON, CAROLINA FREIGHT CARRIERS CORP., CENTRAL MILKHAULING INC., CHAMBERLAND'S EXPRESS, INCORPORATED, CENTRAL NEW YORK FREIGHTWAYS, INC., CHICAGO EXPRESS, INC., CLINTON TRANSPORTATION CORP., COLEMAN BROS. TRANSPORTATION LINES, COOPER-JARRETT, INC., CORNERS MILK TRANSPORTATION, WILLIAM H. COSSEBOOM, WILLIAM CRIST, CROSS TRANSPORTATION, INC., D. & N. MOTOR TRANSPORTATION CO., DANA TRUCKING CO., INC., DANIELS MOTOR HAULAGE CORP., THE DAVIDSON TRANSFER & STORAGE CO., VITO MINERVINO d/b/a DECKING TRUCKING CO., DENVER CHICAGO TRUCKING COMPANY, INC., DeSTEFANO TRUCKING CO., INC., DORN'S TRANSPORTATION, INC., EASTERN MOTOR DISPATCH, INC., EASTERN MOTOR EXPRESS, INC., EASTERN TRANSPORTATION COMPANY, INC., THE EL DORADO TRANSPORTATION COMPANY, INCORPORATED, ELSON TRUCKING CO., INC., EMMOTT-VALLEY TRANSPORTATION CO., INC., FEUER TRANSPORTATION, INC., THEO. FICKE, INC., L. S. FILBERT, INC., FISH TRANSPORT CO., INC., FORST TRUCKING COMPANY, INC., FOWLER & WILLIAMS, INC., FOWSER FAST FREIGHT, INC., FRIEDMAN'S EXPRESS, INC., GEORGE'S TRANSPORTATION CO., INC., GILBERT CARRIER CORP., SAMUEL GOLDSTEIN and FRANK J. GOLD-

STEIN d/b/a SAMUEL GOLDSTEIN & SON, H. & H. TRANSPORTATION LINES, HARDER'S EXPRESS, INC., HARTFORD TRANSPORTATION CO., INCORPORATED, HEMINGWAY BROTHERS INTERSTATE TRUCKING COMPANY, FRANK M. HERBERT, INC., VINCENT J. HERZOG, HOFFMAN'S MOTOR TRANSPORTATION, INTERCITY TRANSPORTATION CO., JOHNSON MOTOR LINES, INC., THOMAS JORDANO & SON, INC., KEAHON TRUCKING CORP., KING TRUCKING COMPANY, KRAMER BROS. FREIGHT LINES, INC., L. & S. DELIVERY & TRANSFER CO., INC., FRED D. LANGDON, LANSDALE TRANSPORTATION CO., INC., LASKAS MOTOR LINES, INC., LEONARD DELIVERY CORP., HENRY C. LESWING, LITCHHULT TRUCKING CO., INC., LONG ISLAND DELIVERY CO., INC., FRANK LUNDY d/b/a THE FRANK LUNDY TRUCKING CO., M. & R. TRANSPORTATION CO., INC., M. W. TRANSPORTATION TRUCKING, NOAH MAISLIN d/b/a MAISLIN BROS., MANGAM-KESTER TRANSFER CORPORATION, MARCELL'S MOTOR EXPRESS, MARTIN'S TRUCK, INC., G. T. MCGOVERN TRUCKING CO., INC., MCLEAN TRUCKING COMPANY, MIDWEST FREIGHT FORWARDING COMPANY, MILLER TRANSPORT CO., INC., MODERN MOTOR, MONARCH MOTOR FREIGHT CO., INC., JAMES J. MORRISSEY, INC., MOSHASSUCK TRANSPORTATION COMPANY, MOSKOWITZ MOTOR TRANSPORTATION, INC., MOTOR CARGO, INC., MUNDY MOTOR LINES, MUNICIPAL HAULAGE CO., INC., FRANK MURPHY, P. B. MUTRIE MOTOR TRANSPORTATION, INC., NEEDES EXPRESS, INCORPORATED, L. NELSON & SONS TRANSPORTATION CO., JESS R. NEUFELD, NEWBURGH TRANSFER, INC., NEW ENGLAND MOTOR FREIGHT, INC. (Lessee & Operator), N. Y. & WORCESTER EXPRESS, INC., NEW YORK MID HUDSON TRANS. CORP., NORWICH TRUCKING CO., O. K. EXPRESS CORP., INC., OLD COLONY MOTOR LINES, INC., J. & M. O'NEIL, INC., RICHARD F. OWENS and ALLEN J. OWENS d/b/a OWENS TRUCKMEN, P. & G. MOTOR FREIGHT, INCORPORATED, PALMER LINES, INC., PALMER TRANSFER CO., PILOT FREIGHT CARRIERS, INC., PLYMOUTH ROCK TRANSPORTATION CORP., ELON V. PORTER, PORT JERVIS TRUCKING CO., INC., T. PORTO AND SONS, INCORPORATED, QUEENS FARMS DAIRY CO., QUINN FREIGHT LINES, INC., RAND EXPRESS FREIGHT LINES, INC., RAPID MOTOR LINES, INC., REDNER AND TURCO, RED STAR EXPRESS LINES OF AUBURN, INCORPORATED d/b/a RED STAR EXPRESS LINES, D. L. REED, ROADWAY EXPRESS, INC., ROADWAY TRANSIT COMPANY, ROBERT'S EXPRESS, INC., ROSS TRUCKING CO., RUDOLF MOTOR LINES, INC., RUPP TRUCKING CO., INC., S & D MOTOR LINES, INC., SCHREIBER TRUCKING CO., INC., SCHUSTER'S EXPRESS, INC., SCHUTT TRUCKING LINES, SENECA TRANSPORTATION LINES, INC., SHAWMUT TRANSPORTATION CO., INC., SHEPHARD WAREHOUSES, INC., SHIRKS MOTOR EXPRESS CORPORATION, SMITH BROS. TRANSPORTATION CORP., SMITH TRANSPORT LTD., THE H. T. SMITH EXPRESS CO., INC., SOMMERS MOTOR LINES, INC., SPECTOR MOTOR SERVICE, INC., STATE FREIGHT LINES, INC., STUBBS TRANSPORTATION CO., INC., H. E.

SWEZEY & SON MOTOR TRANSPORTATION, INC., JAMES P. TUCCINARDI d/b/a T. & T. TRUCKING & TRANSPORTATION CO., JOSEPH TAYLOR TRUCKING CORP., EDWARD A. THOMPSON, INC., TIDEWATER TERMINALS TRANSPORTATION CO., INC., TORSNEY & MOLONEY TRUCKING CO., INC., TRANSAMERICAN FREIGHT LINES, INC., VALLERIE'S TRANSPORTATION SERVICE, INC., VALLETTA MOTOR TRUCKING CO., INC., VAN ROMPAYE TRUCKING CO., VICTOR LYNN LINES, INC., VICTORY CORPORATION, JOHN VOGEL, INC., VOLLMER TRANSPORTATION, INC., WARD TRUCKING CORP., H. P. WELCH CO., JOSEPH F. WHELAN CO., INC., ANNA WINNICK d/b/a N. WINNICK, WOOSTER EXPRESS, INC., YORK MOTOR EXPRESS COMPANY, ANDERSON'S TRUCKING CORP., CARL F. BAST and NEIL J. BAST d/b/a D. F. BAST, LEWIS E. GUERIN d/b/a DOVER TRUCKING COMPANY, ELDRIDGE STORAGE, MAIN TRUCKING & RIGGING CO., INC., NORTH BRADDOCK MOTOR LINES, NEW YORK & NEW JERSEY FREIGHTWAYS, INCORPORATED, FRED THOMAS, BROWN'S EXPRESS, INC., DOVER TRUCKING CO., ELDREDGE STORAGE, MAIN TRUCKING & RIGGING CO., INC., NEW YORK & NEW JERSEY FREIGHTWAYS, INCORPORATED, FRED THOMAS, NORTH BRADDOCK MOTOR LINES, MAIN TRUCKING & RIGGING CO., INC., N. Y. & N. J. FREIGHTWAYS, INC., DOVER TRUCKING COMPANY, ELDREDGE STORAGE, FRED THOMAS, CATHERINE BARTOLETTA and BRUNO CALABRIA d/b/a NORTH BRADDOCK MOTOR LINES, WM. MCCULLOUGH TRANSPORTATION CO., INC., HARRISON MOTOR FREIGHT, KRUSE TRUCKING CO., JOHN NEWTON d/b/a J. NEWTON TRUCKING, THOMAS A. WALSH d/b/a WALSH BROS., JOHN WEHRLE, JR., INC., TRANSAMERICAN FREIGHT LINES, INC., ACE IRON & METAL CO., GEORGE B. HARRIS, SR. and GEORGE B. HARRIS, JR. d/b/a OILWAYS CO., C. W. KUEHNE and DOROTHE B. KUEHNE d/b/a KUEHNE CHEMICAL COMPANY, and EXCELSIOR SUPPLY CO., LOWELL GILMACK; WILLIAM MAYER DAIRY DISTRIBUTORS, INC., SAVIN EXPRESS, ARROW CARRIER CORPORATION; APEX EXPRESS, INC., LOMBARD BROS., INCORPORATED,

Petitioners,

against

SPENCER E. BATES, ALLEN J. GOODRICH and EDWARD H. BEST, as officers and members of the State Tax Commission, created pursuant to the provisions of Article 8, Section 170 of the Tax Law of the State of New York (Chapter 60 of the Consolidated Law of the State of New York),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners hereinabove named respectfully pray that a writ of certiorari issue to review so much of the decision of the Court of Appeals of the State of New York made on October 21, 1952 (136)* as denied petitioners' motion for reargument of the appeal herein to that Court and adhered to the decision of that Court made on July 15, 1952 (123-126) affirming a judgment of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (104-105) which, in turn, affirmed a judgment of the Supreme Court of the State of New York, in and for Albany County, in favor of the respondents and against the petitioners declaring that Article 21 of the Tax Law of the State of New York is in all respects valid and constitutional and dismissing the complaint herein upon the respondents' motion for judgment on the pleadings (11-12).

In support of their petition, your petitioners respectfully show to this Honorable Court:

A

STATEMENT OF THE MATTER INVOLVED

1

The Parties and the Nature of the Litigation

This action was instituted by your petitioners to enjoin the enforcement of Article 21 of the Tax Law of the State of New York (Tax Law, Sections 505-515; hereinafter sometimes referred to as the "Ton Mile Tax Law" or the "Weight Distance Tax Law") on the grounds, among

* Figures in parenthesis, unless otherwise noted, refer to pages of the record.

others, that it violates Article I, Section 8, Clause 3 and the Fourteenth Article of Amendment of the Constitution of the United States.

The complaint (which is bound into the record at pp. 16-17) alleges that the petitioners (plaintiffs and appellants in the Courts below) are motor freight carriers which variously transport commodities of all kinds from the several States to points within the State of New York; from that State to points in other States; from points within that State to other points within that State; and from points outside of that State, across the State, to other points outside the State (Pars. 1, 14, 21, 22, 28, 29, 34 and 35 of the complaint), and are subject to all of the provisions of the Ton Mile Tax Law (Pars. 5, 6, 16, 24, 30, 34 and 35 of the complaint). It also alleges that the respondents (defendants below) are members of and constitute the New York State Tax Commission (Par. 2 of the complaint).

The complaint further alleges that the Ton Mile Tax Law, among other things, imposes a tax on motor vehicles operating within the State of New York in both interstate and intrastate commerce based upon their gross weight multiplied by their mileage within the State (Par. 5(d) of the complaint). It is further alleged that the Ton Mile Tax Law contains provisions, hereinafter described, which exempt numerous classes of motor vehicles from the tax and from the other requirements imposed by the law; that these exemptions are unreasonable, arbitrary and discriminatory; that interstate commerce is unconstitutionally burdened, discriminated against, and regulated in violation of Article I, Section 8, Clause 3, of the United States Constitution; and that petitioners are deprived of due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment (Pars. 5(e), 8, 9 and 10 of the complaint).

The respondents' answer is simply a general denial (18-19). It contains no affirmative allegations controverting the matters alleged in the complaint. Along with their answer, respondents served a motion for judgment on the pleadings (81-84). Since the answer was simply a general denial, respondents' motion for judgment on the pleadings amounted to a claim that petitioners' contentions are without merit as a matter of law, irrespective of any evidence which petitioners might have been able to adduce upon trial to prove those contentions.

Respondents' motion for judgment on the pleadings was granted by the Supreme Court, Albany County (8-10, 85-97). The Appellate Division, Third Department, affirmed (101-105, 108-121). The Court of Appeals also affirmed without opinion (123-125) and denied reargument (136).

The decision of the courts of New York dismissing the petitioners' complaint upon the respondents' motion for judgment on the pleadings, and without granting a trial, constitutes a holding not merely that the Ton Mile Tax Law is valid and constitutional on its face, but also that the petitioners could not possibly adduce any proof upon trial which would establish the contrary.

2

The Statute Here Drawn Into Question

The Ton Mile Tax Law (Article 21 of the Tax Law) purports to impose a compensatory tax upon motor carriers for the use of the highways of the State of New York. Thus, the Legislature made the following findings and declaration:

> "The legislature hereby finds and declares that the operation of heavy motor vehicles upon the highways of this state greatly increases wear and damage on such highways; that there is a direct relationship between the weight of the vehicle using such highways

and the damage done to them; that the period of usefulness of such highways is shortened by such use; that the effect of such use is to create and augment hazards to pedestrians and other traffic and to impose on the state a heavier financial burden for highway construction, maintenance and policing than does the operation of smaller vehicles; that the provisions of this article are therefore necessary and are hereby enacted to distribute more equitably this financial burden and to compensate the state in part for the privilege granted to such heavy vehicles of using the highways of the state and for the cost of administering state traffic regulations."

The substantive provisions of the law may be conveniently divided into four basic categories:

(a) Permit and tax requirements;

(b) Exemptions;

(c) Record keeping requirements;

(d) Enforcement and procedural remedies.

(A) Briefly, motor carriers are required to pay for and display a permit for each non-exempt vehicle operated over the highways of this State (Section 502), and to pay a weight-distance tax on their non-exempt vehicles operated over the highways of the State (Section 503).

(B) The following exemptions are created:

1. All vehicles and combinations of vehicles having a gross weight of 18,000 pounds or less are exempt from both the permit and tax requirements (Tax Law, Section 501, subdivision 2).

2. All omnibuses are exempt from both the permit and tax requirements (Tax Law, Section 501, subdivision 2).

3. Vehicles owned and operated by farmers in transporting farm produce and farm supplies are exempt from both the tax and permit requirements (Tax Law, Section 504).

4. All vehicles of a gross weight of over 18,000 pounds operated exclusively within the incorporated limits of a city or village or "within the limits of any zone established by the Public Service Commission" are exempt from the tax but subject to the permit requirement (Tax Law, Section 503, subdivision 2).

(C) Every motor carrier is required to "keep a complete and accurate daily record which shall show the miles traveled in this state by each vehicular unit and such other information as the tax commission may require" (Section 507), and to file monthly tax returns and to pay the tax (Sections 505 and 506).

(D) The Tax Commission is authorized, among other things, to prescribe methods for ascertaining miles traveled and the weight of vehicles; to establish record keeping procedures and forms of records; to require the filing of surety bonds; and to implement the statute by rules and regulations (Section 509). Equally significant is the power vested in the Tax Commission to determine, within five years after the date of filing of a return, the amount of tax due (Section 509), and to enforce collection of the tax by civil suit, levy of attachment upon a taxpayer's property, seizure and sale of motor vehicles and revocation of all motor vehicle registration plates (Section 511).

Incorporated into the statute are also provisions for criminal penalties (Section 512).

Taxpayers who contest the applicability of the tax or the amount demanded, are restricted to the limited remedy of an administrative hearing and subsequent review of the decision of the Tax Commission under Article 78 of the Civil Practice Act. But such review is conditioned upon the payment of the tax and penalties claimed by the Tax Commission and the filing of a bond for costs (Section 510).

3

The Decision Below

The Court of Appeals affirmed the judgments below without opinion (123-125) and wrote no opinion in denying petitioners' motion for reargument (136). Accordingly we must look to the opinion of the Appellate Division (108-121) for an expression of the views of the Courts of New York on this case. In that opinion the Appellate Division concluded:

1. That the tax complained of "does not fall numerically, at least, in disproportion on interstate commerce" (113).

2. That the Weight Distance Tax is a "sensible regulation of the New York Legislature making a charge on the use of New York highways and having a basis in what the Legislature believed to be a traffic or highway need" (114).

3. That the Weight Distance Tax imposes "a fair charge for the use of its roads and for the cost of the special requirements of regulation" (114).

4. The Weight Distance Tax does not create an undue burden on interstate commerce (112-119).

5. That the Weight Distance Tax falls equally "on intrastate vehicles of the same weight and following the same routes as interstate vehicles" (115).

6. That the exemptions are reasonable (116).

7. That the classification of carriers subject to the tax is reasonable and non-discriminatory (119).

8. That the exclusion of omnibuses from the tax is justified "upon the ground that their effect on state highways as a whole is relatively small and bears most heavily on local streets and roads" (120).

9. That the exemption of zonal and local city and village traffic is "within the legislative competence and are not unreasonable" (120).

Briefly stated, the Appellate Division assumed the existence of facts which could be established only after trial and relied upon principles of law which do not govern the issues involved. The remittitur of the Court of Appeals makes clear that constitutional issues were ruled upon by the courts of the State of New York.

B

THE JURISDICTION OF THIS COURT

Petitioners seek review by certiorari pursuant to Title 18 U. S. Code, Section 1257. The basis for review is that the validity of a statute of the State of New York is drawn in question on the ground of its being repugnant to the Constitution of the United States and that a right is claimed under the Constitution of the United States.

The statute here involved, the validity of which is drawn in question, is Article 21 of the Tax Law of the State of New York (Tax Law, Sections 501-515, c. 74, L. 1951). The pertinent provisions of the statute are summarized above.

The decision sought to be reviewed was rendered on October 21, 1952 (136).

The federal questions here involved were presented in the petitioners' complaint (Pars. 8, 9 and 10) and also their briefs on appeal to the Appellate Division and the Court of Appeals,* in their arguments before those courts, and in their motion before the Court of Appeals for reargument or to amend the remittitur (126-135). The federal questions were passed upon by the Court of Appeals and were

* Under New York practice, there are no assignments of error and no bill of exceptions on appeal; hence, constitutional questions on appeal can be raised only in the briefs and on argument.

decided in favor of the validity of the State statute drawn into question and against the right claimed under the Constitution of the United States.

C

QUESTIONS PRESENTED

1. Whether a statute imposing a weight distance tax on motor vehicles in both interstate and intrastate commerce, which exempts from its provisions numerous classes of vehicles including, among others, vehicles of a gross weight of 18,000 pounds or less, omnibuses, vehicles owned and operated by farmers in transporting farm produce and farm supplies, and vehicles operated exclusively within cities, villages and "exempt zones" does not unreasonably burden interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution.

2. Whether such a statute does not discriminate against interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution.

3. Whether such a statute exacts, from interstate carriers, permissible compensation for the use of State highways or, in actual incidence, constitutes a forbidden regulation of interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution.

4. Whether such a statute is not unreasonable and in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

5. Whether such a statute does not create unreasonable and arbitrary classifications in violation of the Equal Protection of the Laws Clause of the Fourteenth Amendment of the United States Constitution.

6. Whether the action of the courts of New York in denying the petitioners an opportunity to prove upon trial that such a statute, in its actual operation and effect, unreasonably burdens, discriminates against and regulates interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution, does not deprive the petitioners of the due process of law guaranteed to them by the Fourteenth Amendment of the United States Constitution.

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Ton Mile Tax Law here in question purports to levy a tax, which falls upon motor vehicles in interstate as well as intrastate commerce, to compensate the State for the privilege of using its highways and for the cost of administering State traffic regulations. The law must therefore stand or fall as one imposing a compensatory use tax.

The substantive provisions of the law, however, plainly establish, contrary to the legislative declaration, that the tax imposed is not a valid compensatory use tax. This is so because the exemptions from the tax above referred to are so extensive and sweeping in character that a tiny fraction of the total number of motor vehicles operating over a limited number of highways in the State of New York are required to bear the entire burden of the tax and the cost of maintaining, constructing and repairing all the highways of the State. Although statutes containing one or perhaps two of the exemptions contained in this law have heretofore come before this Court, no statute containing all of the broad exemptions contained in this statute has, so far as we have been able to determine, ever been passed upon and sustained by this Court as imposing a compensatory use tax. Since the tax here imposed is not a valid compensatory use tax, it plainly constitutes a bur-

den on interstate commerce in violation of Article I, Section 8, of the Constitution.

2. While this Court has considered many cases involving state taxation of interstate carriers, a tax of the character involved here has never been before this Court. Since an increasing number of states have enacted or are considering the enactment of a similar tax, a definitive ruling by this Court will avoid a multiplicity of suits in numerous State and Federal Courts.

3. Furthermore, although the law does not expressly discriminate against interstate commerce, its operation and effect plainly result in such discrimination, since the few vehicles upon which the entire burden of the tax falls are predominantly in interstate commerce, while the exempt vehicles are predominantly intrastate.

4. Since the sweeping exemptions contained in the law cannot, on their face, have any legitimate fiscal purpose, their purpose must be to promote social policies of the state. But the imposition of State social policies upon interstate motor vehicles is plainly an unconstitutional attempt by the State directly to regulate interstate commerce.

5. The action of the State courts in refusing to allow the petitioners an opportunity to prove their contentions upon a trial not only was arbitrary but also violated the petitioners' constitutional rights. This Court has frequently held that the validity of a statute raising important constitutional questions which involve the actual impact and incidence of such statute under existing conditions, should not be decided upon the pleadings or on affidavits, but only after a trial at which all of the pertinent facts can be developed. The Ton Mile Tax Law here in question is just such a statute. The incidence of the tax upon motor vehicles in interstate commerce as contrasted with its incidence on motor vehicles in intrastate com-

merce, the extent of the impact and burden which the tax imposes upon interstate motor vehicles, and the actual effect of the tax as a regulation of interstate commerce are all questions which should not be summarily disposed of upon a motion for judgment on the pleadings. Only a trial can resolve the basic issue of effect and impact of the tax. Accordingly, the decision of the New York courts, upon the pleadings alone, that the Ton Mile Tax Law does not violate the Constitution of the United States deprived the plaintiffs of the due process of law guaranteed to them by the Fourteenth Amendment.

6. The litigation here is not one which solely involves private parties. There is a profound and abiding public interest in the issues here presented which should be resolved by this Court. Competent economists estimate that the tax imposed by the Ton Mile Tax Law will add $500,000,000 annually to the cost of consumers' goods. To be sure, the amount of the tax as imposed on an individual carrier is not very great. But the impact of the tax on the motor carrier industry is substantial, and the tax itself has implications of such national significance as to require a complete and thorough review by this Court.

Motor transportation is one of the country's major industries. The livelihoods of hundreds of thousands of persons are directly dependent upon the efficient and economical conduct of this business. If the State of New York is permitted to discriminate against interstate motor transportation, it is not too much to say that motor transportation in the country as a whole will be crippled. Already several states have taken reprisals against the State of New York by withdrawing reciprocity arrangements. The tax in question, therefore, has cumulative effects. Not only are motor carriers operating in the State of New York subject to the tax, but further taxes are imposed by the action of other states in withdrawing reciprocity arrangements. Records publicly available demonstrate that thousands of carriers conduct business on operating ratios

dangerously close to bankruptcy. The imposition of these taxes may well permanently injure their financial structures.

It is already clear from action taken by various states in withdrawing reciprocity that the widespread adoption of the ton-mile tax will simultaneously balkanize the United States by erecting ports of entry among the states and destroy the interstate motor transportation industry. In addition to the crucial questions of inter-governmental tax relationships suggested by this case, there inheres, in the technique of a ton-mile tax, a grave challenge to the primacy of the Federal government in matters relating to interstate commerce.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the said action and to stand to and abide by such order and direction as this Honorable Court shall deem meet and the circumstances of this case require, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem just and proper.

Dated: New York, January 15, 1953.

HYMAN N. GLICKSTEIN,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. .....

MID-STATES FREIGHT LINES, INC., et al.,

Petitioners,

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SPENCER E. BATES, et al., etc.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Opinions Below

The opinion of the Supreme Court of the State of New York, Albany County, is reported at 200 Misc. 885. The opinion of the Appellate Division of the Supreme Court, Third Department, is reported at 279 App. Div. 451. The memorandum of the New York Court of Appeals affirming the judgment appealed from is reported at 304 N. Y. 700. The memorandum of the New York Court of Appeals denying petitioners' motion for reargument and granting their application to amend the remittitur is reported at 304 N. Y. 788.

Jurisdiction

The bases upon which the jurisdiction of this Court is invoked are set forth in the foregoing petition for a writ of certiorari.

Statement of the Case

A summary statement of the case has been given in the foregoing petition for a writ of certiorari, and for brevity the statement is not repeated here.

Specifications of Error

The Courts below erred in holding:

1. That the Ton Mile Tax Law does not burden interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

2. That the Ton Mile Tax Law does not discriminate against interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution.

3. That the Ton Mile Tax Law does not regulate interstate commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution.

4. That the Ton Mile Tax Law does not deprive petitioners of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

5. That the Ton Mile Tax Law does not create unreasonable classifications and discrimination and thereby deprive petitioners of the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

6. That the action of the Courts of New York in denying the petitioners an opportunity to prove their case upon a trial and in holding the Ton Mile Tax Law valid and constitutional upon the pleadings and without a trial does not deprive petitioners of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

7. That the Ton Mile Tax Law exacts only a permissible compensatory use tax.

ARGUMENT

POINT I

The New York Courts erroneously concluded, without according plaintiffs-appellants a trial, that Article 21 exacts from interstate commerce a fair share of the cost of highway maintenance, repair and construction.

As we have already noted, the Court of Appeals rendered no opinion in affirming the judgment appealed from. Accordingly, the opinion of the Appellate Division (109-121) is the most definitive expression of the views of the Courts of New York on this case. We shall, therefore, refer to that opinion in the course of our argument.

(A) The Appellate Division failed to distinguish between regulation under the police power and compensatory taxes.

An analysis of the opinion of the Appellate Division reveals this fundamental error: a failure to distinguish between regulation of highway traffic under the police power of the State and the exaction of a compensatory tax for the use of the highways.

Simply stated, there are three basic but wholly distinct principles of law which have special relevance in this case.

(a) A compensatory tax which exacts, from interstate commerce, a *fair share* of the cost of constructing, maintaining and policing the highways is constitutionally permissible. Contrariwise, a tax on interstate commerce which, in fact and by its incidence, exacts a disproportionate share, is invalid as an undue burden upon and regulation of, interstate commerce.

(b) A reasonable and non-discriminatory license fee exacted as an incident to regulation of highway traffic under the police powers of the State may not be challenged even if the impact is primarily upon interstate commerce. But if a safety measure and use privilege tax are imposed in one statute, the tax must represent no more than a fair distributive share of the cost of maintaining, constructing and repairing the highways.

(c) A classification of taxpayers which has a rational basis does not impair the validity of a statute. Hence, classification is material only where, in the instance of a purely regulatory statute adopted under the general police powers, it is unreasonable. In such a case, the statute offends against the due process and Equal Protection of the Law clauses of the Fourteenth Amendment of the United States Constitution. In short, the issue of classification is a meaningless concept when an allegedly compensatory tax is challenged. The distinction is significant for this reason: where the power to regulate or to tax is plenary, the Legislature may, despite the inhibitions of the due process and Equal Protection of the Law clauses of the Fourteenth Amendment, employ its regulatory and/or taxing powers to promote the social policies of the State. But where interstate commerce is involved, the State cannot tax for social policy objectives. Hence while diversion of highway use taxes does not invalidate a compensatory tax, if the diversion is designed to effectuate social policy programs of the State, the State violates the Commerce Clause when it employs tax revenues derived from interstate carriers to effectuate its social policy objectives.

It is plain, therefore, that decisions which sustain regulatory statutes adopted under the general police powers are not authorities for compensatory tax statutes.

To illustrate a State law, regulating the height and width of intrastate and interstate trucks, which exacts a reasonable incidental license fee cannot be challenged even though the operational effect of the tax is such that interstate trucks alone pay the fee. If the classification is reasonable, the interstate carrier cannot complain. On the other hand, if a statute purports to exact compensation for the use of its highways and if the cost of maintaining the highways for all carriers is thrust exclusively, or in a grossly disproportionate degree, upon interstate carriers, it is invalid as an invasion of Federal powers under the Commerce Clause.

By treating the two concepts as indistinguishable, and confusing a regulatory measure with a compensatory tax, the Appellate Division is led into error, best illustrated by the following statement in its opinion:

> "We deem it to be an admissible inference from what the Supreme Court has said, as well as from what it has decided, and especially from what is implicit in *Morf* v. *Bingaman* (298 U. S. 407), the New Mexico tax-on-motor-caravan case, that there are circumstances under which a sensible regulation of the New York Legislature making a charge on the use of New York highways and having a basis in what the Legislature believed to be a traffic or highway need would be valid even if in its operational effect interstate commerce would always or usually pay the full bill" (340-341).

The Appellate Division's conclusion would be unassailable if Article 21 were a police measure and not a purported compensatory tax. Indeed, that Court recognizes that the test is the fairness and proportionality of the tax:

> "If a type of truck were used solely in interstate commerce which by the thrust of weight or velocity

> affected the highways disproportionately to general use or imported with arrival a special traffic problem, the power of the state *to make a fair charge for the use of its roads and for the cost of the special requirements of regulation would be undoubted.* It would not be regarded by the United States as an undue burden on interstate commerce" (341). (Italics supplied.)

The basic inquiry in this case is plainly whether this purportedly compensatory tax does exact a fair share of the cost of highway maintenance from interstate carriers. Adopting the legislative finding as conclusive and uncontrovertible, the Appellate Division assumed what, basically, needed to be proved. It is fundamental that:

> "* * * it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer."
>
> *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 213.

The criterion of whether a fair share is exacted is not self-serving statutory language, but rather the *incidence* of the tax. Merely because the tax falls upon carriers who use the highways does not invest the statute with presumptive validity.

Interstate Transit v. *Lindsey,* 283 U. S. 183.

That a compensatory tax does, in fact, exact a disproportionate share from interstate commerce can be demonstrated, in the last analysis, upon a trial of all the issues. The presumption of correctness which attaches to legislative findings must succumb to facts which contradict the legislative declarations. Here, the legislative history casts suspicion on the validity of the purported findings.

(B) A history of the statute conclusively exposes the tax as an unconstitutional burden upon discrimination against and regulation of interstate commerce.

In 1949, the New York State Legislature established a Joint Legislative Committee, called the "Manning Committee". The task of this Committee was to consider all revenues which might be derived from the State highway and canal systems. Resolution No. 170 set forth three major "findings":

1. Commercial vehicles of common carriers "cause far greater damage to our highways than the non-commercial vehicles using them."

2. Common carriers derive greater benefit from these highways than the ordinary private citizen and make no special contribution to their construction or to their costs of their rights of way.

3. Common carriers are "thus able to compete at an advantage to railroads which are required to pay for and maintain their own rights of way."

At the very outset, the inquiry of the Manning Committee was designed not only to set up a system of taxation of all common carriers for the use of highways, *but to restore competitive conditions between the railroads and the motor common carriers.* It is clear, therefore, that the objectives of the legislation were not purely fiscal.

The Manning Committee conducted numerous hearings and relied upon extensive surveys. The burden of these surveys and studies was that the State received more in taxes on highway users than was appropriated to the maintenance, construction and policing of highways and that a substantial part of the revenues received from highway users was diverted. To be sure, it is not claimed that the diversion of highway users' taxes under the Con-

stitution of New York impairs the validity of the tax. But as plaintiffs-appellants will demonstrate, the fact of diversion throws doubt upon the claim that the tax is imposed in order to secure funds for the contruction and maintenance of the highways.

There are several other significant facts which bear on this issue. The studies of the Manning Committee demonstrated that of the total of 65,200 miles of surface highways in New York State, more than 50% of all the highway mileage used by heavy vehicles were found in exempt zones and municipalities. Accordingly, the claim that the legislation was designed to provide revenue for the care of State highways is immediately contradicted by the legislative exemption of more than 50% of the highways from the tax. Plainly, carriers subject to tax are now required to pay enough in revenues to provide the funds for the construction of all the highways, including those damaged by carriers who operate exclusively within the exempt zones.

The alleged correlation between the weight of vehicles and damage to highways does not support the statutory standard of 18,000 pounds. The Manning Committee found that a substantial amount of highway damage was caused not by the operation of heavy motor vehicles but by broken highway joints, defective sub-soil, frost, drainage, seepage, and other climatic conditions and various structural deficiencies. Further, the Committee found that vehicles having an *axle load limit* of more than 18,000 pounds rather than a maximum gross weight of 18,000 pounds (as the statute provides) create highway damage. Hence, the burden of the tax is imposed on vehicles which, by the very findings of the Committee, do not create highway damage.

Finally, the Committee recognized that the largest number of vehicles operating on the highways were farm vehicles.

The nub of the matter is that the tax not only fails to meet the test of fairness but, by its conception, was designed to place a discriminatory burden on motor common carriers engaged in interstate commerce. Indeed, the Manning Committee report shows that the intention of the Legislature was to narrow as far as possible the types of vehicles that would bear the overwhelming burden of the tax and to place the burden, so far as possible, on the vehicles engaged in interstate commerce. And this forbidden objective is proved by the fact that the bulk of tax receipts under this law have been received from vehicles of interstate carriers.

That the burden upon interstate carriers was not only intentional but inevitable is evident when the character of the exemptions is carefully considered.

(C) The exemptions of vehicles having a maximum gross weight of less than 18,000 pounds is proof of the discriminatory character of the tax.

The Appellate Division incorrectly concluded that appellants object to the use of the formula of 18,000 pounds as a formula. Appellants recognize that every tax statute necessarily requires graduation. But the 18,000 pound formula, by its incidence, is instinct with a design to burden and regulate interstate commerce.

Indeed, plaintiffs-appellants can prove, upon a trial, that interstate transportation is carried on, in the main, in vehicles the maximum gross weight of which exceeds 18,000 pounds. The Appellate Division did not grant a trial because it assumed that this case involved the problem of classification for which there was a rational basis. But classification is not material where, as in the case at bar, the challenge is to a statute which purports to exact compensation for services rendered by the State measured by the amount of that service.

That a limited number of trucks will be subject to the tax is shown by the statistics of the Tax Commission as follows:

Weight	*Number**
2,000 to 4,000 pounds	202,910
4,001 to 6,000 pounds	110,609
6,001 to 8,000 pounds	79,377
8,001 to 10,000 pounds	33,948
10,001 to 12,000 pounds	16,831
12,001 to 14,000 pounds	10,725
14,001 to 16,000 pounds	6,645
16,001 to 18,000 pounds	3,584
18,001 and over	5,692

Apart from this fact the number of trucks using the highways is a small part of the total number of vehicles operating over the highways, the admitted fact is that a minuscule number of trucks have to bear the whole cost. The conclusion is inevitable that this limited number of interstate trucks must bear a *disproportionate* share of of the cost of highway maintenance, repair and construction.

Implicit in the findings of fact is that lighter vehicles pay their fair share of the cost of highway maintenance by other taxes. But no such finding is actually made. And it can be demonstrated on trial that if such a finding were implicit that it is contrary to the actual facts. At the very least, plaintiffs-appellants are entitled to a trial to prove that vehicles exempted by the statute do not pay their fair share of the cost of maintenance whereas those who are subject pay more than their fair share now.

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* Not including municipal trucks, postal trucks, etc. The foregoing rates are unladen rates whereas the maximum gross weight includes the maximum capacity of the vehicles. Nevertheless, the figures indicate fairly the relative numbers of large and small vehicles using state highways.

(D) The zonal exemption establishes the discriminatory character of the tax.

The Appellate Division construes plaintiffs-appellants' objections to zonal exemption as a claim of unreasonable classification when, in fact, the basic contention of plaintiffs-appellants is that by exempting a large portion of vehicles of the same kind as those operating in taxable areas the State imposes on a handful of interstate motor carriers more than their fair share of the cost of the service provided by the State.

The zone exemptions apply to 50% or more of all State highways. Clearly, if this contention is proved on trial, then a very small proportion of the traffic on the State highways is subject to tax.

(E) The exemption of omnibuses creates a discriminatory burden on interstate commerce.

It is a familiar fact that omnibuses operate primarily in intrastate commerce. At least, plaintiffs-appellants should have an opportunity to show that upon a trial. But the Appellate Division justifies the exemption on the ground that buses may be properly excluded because they are already subject to another tax. *But the tax paid by buses is not intended to compensate for the use of highways.* On the contrary, the tax paid by omnibus companies is a special corporate or quasi corporate franchise tax. Hence, it would be just as much a reason for excluding buses because they pay gross receipts taxes as to exclude them from paying income taxes. Clearly, when a State deals with its own commerce it may favor one class of commerce against another. But that is not true where interstate commerce is involved.

(F) The farmer exemption is further evidence of discrimination.

To support the exemption of farmers, the Appellate Division relies on cases which involve problems of classification. But considerations which may be determinative of the problem of classification have no application when the object of the challenged statute is compensation for services actually rendered. Moreover, in all of these cases it was found that the exemptions of farmers were *de minimis*. Obviously, an exemption may be *de minimis* insofar as the equal protection clause of the Fourteenth Amendment is concerned, but substantial when the question involved is one of discrimination against interstate commerce. This issue can only be resolved upon a trial.

POINT II

The weight distance tax unconstitutionally burdens, discriminates against and regulates interstate commerce.

(A) As to the 18,000 pound limitation.

The basic issue which must be resolved is whether Article 21, which purports to exact compensation for services rendered to interstate carriers, imposes upon them a fair share of the cost of the service.

This concept is fundamental: a State may, under its police power and in the interest of safety on the highways, regulate interstate carriers. In this connection, a reasonable incidental fee may be charged. But to impose this regulatory fee, if substantial, exclusively upon interstate carriers would run afoul of the due process and equal protection of the laws clauses of the Fourteenth Amendment. In such a case classification becomes a paramount issue. Clearly, a State may combine both a safety measure

with a compensatory tax. Indeed, if the alleged incidental license fee is intended to compensate for the use of the highways, the question then is whether or not there is a violation of the Commerce Clause. Hence, even if interstate carriers alone pay the tax under a compensatory statute, imposed on interstate and intrastate carriers alike, there can be no challenge to the legislation so long as the tax exacts only a fair contributive share. On the other hand, if the tax, by its incidence, exacts from interstate carriers more than a fair share, then it must fail as a burden upon, discrimination against and a regulation of interstate commerce. Clearly any discrimination will invalidate a compensatory tax on interstate carriers.

In *Barrett* v. *New York*, 232 U. S. 14, the Court considered a general regulatory statute which had been enacted by the State of New York as a safety measure under its general police power. This statute exacted a licensing fee as an incident of such regulation. The statute was attacked as unconstitutional under the Fourteenth Amendment and the Interstate Commerce Clause. This Court concluded that the Act was a regulatory statute and, because of certain of its features, it was held unconstitutional as interfering with and burdening interstate commerce. Accordingly, the Court did not discuss the other features of the case such as the fact that the licensing fees were exacted only from those engaged in transportation for hire. In the course of discussion on the subject, Mr. Justice Hughes said (pp. 31-32):

> "The requirements of sections 305 and 306 with the schedule of fees in section 308, *cannot be regarded as imposing a fee, or tax, for the use of the streets; if they were such, the question would at once arise as to the validity of the discrimination involved in such an exaction.*" (Italics supplied.)

The Court clearly marked out the distinction between a fee which is incidental to a permissible police regulation of the roads and fees exacted for the use of the roads

or streets as compensation for use. And the principle is clear: where the burden placed on interstate commerce is incidental to police regulation of the highways, i.e., safety regulation, in order to render the legislation unconstitutional, the burden must be shown to be substantial.

On the other hand, where the tax which is imposed is compensatory, any discrimination or favoritism renders the statute unconstitutional.

In *South Carolina State Highway Department* v. *Barnwell Bros.,* 303 U. S. 177, the statute considered was essentially regulatory in character, the most important feature of which was the prohibition of trucks over certain size and width. The problem of compensation for the use of highways was not involved at all and the only question discussed by the Supreme Court was the right of the State under its police power to limit the size and width of trucks in the interest of safety on the highway. In that case Mr. Justice Stone said:

> "The Commerce Clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation normally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state (citing cases). It was to end these practices that the Commerce Clause was operated (citing cases)" (at pp. 185-186).

This basic proposition of law is confirmed by the cases relied upon by the Appellate Division. Summarily stated, they establish these fundamental concepts:

(a) A State may, under its police powers, regulate traffic, both intrastate and interstate, upon the highways.

The regulations must be reasonable and non-discriminatory.

(b) As an incident to police regulation, the State may exact from interstate carriers a *reasonable* license fee to defray the expense of administering the regulations. If the fee is substantial, however, it will be deemed to burden interstate commerce.

(c) The police regulation and the license fee must be imposed equally upon interstate and intrastate carriers; otherwise it offends against the due process and equal protection clauses of the Fourteenth Amendment.

(d) The license fee, exacted from interstate carriers, may include a charge for the use of the highways. But this charge must represent a fair contributive share of the costs of maintaining, constructing and repairing the highways; otherwise it discriminates against and burdens interstate commerce.

(e) If the tax imposed is purely *compensatory* and is levied alike upon interstate and intrastate traffic, it will be upheld provided it represents a fair charge for the cost of highway service and facilities supplied.

This, plainly, is the holding in *Hendrick* v. *Maryland,* 235 U. S. 610. In that case this Court, dealing with a regulatory statute enacted under the police power of the State, held:

> "This is but an exercise of the police power uniformly recognized as belonging to the states and essential to the preservation of the health, safety, and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce" (p. 622).

See, too:

Sprout v. *South Bend,* 277 U. S. 163;
Kane v. *New Jersey,* 242 U. S. 160;
Clark v. *Poor,* 274 U. S. 554;
Carley & Hamilton v. *Snook,* 281 U. S. 66.

In *Sprout* v. *South Bend,* supra, a flat tax was imposed upon buses operating exclusively, but continuously, in local service and an identical tax was imposed upon buses making only a single trip daily. It was established that most interstate buses made a single trip daily. Acknowledging the fundamental proposition that a tax imposed upon interstate carriers which represents a fair contribution to the cost of constructing and maintaining the public highways may be included in a license fee, this Court invalidated the tax because it was neither a proper police measure nor did it represent a fair share of the cost of service to the interstate buses.

In the case at bar a carrier who operates 30 days over the highways within an exempt zone pays no tax; a competitive carrier who operates one day for one mile outside the exempt zone is obliged to pay a tax on all of the mileage operated within the State during the month. In a sense, therefore, this is a flat tax in no wise related to the cost of furnishing facilities to carriers. Clearly, the State incurs as great an expense in providing highway service to carriers who operate exclusively within an exempt zone as it does with respect to carriers who operate for every day in the month but one in an exempt zone and on that one day operate one mile outside the exempt zone.

(Articles 90-92 of The Truck Mileage Tax Regulations, Tax Law, Article 21, Sec. 503.2.)

The basic criteria in testing the constitutionality of a tax imposed upon an interstate carrier were delineated in *Interstate Transit* v. *Lindsey,* 283 U. S. 183. The challenged tax was denominated a privilege tax graduated "according to the carrying capacity" of the vehicles. This Court there held:

(a) "While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163, 72 L. ed. 833, 62 A. L. R. 45, 48 S. Ct. 502) it may impose even upon motor

vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon [Kane v. New Jersey, 242 U. S. 160, 168, 169, 61 L. ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. 554, 71 L. ed. 1199, 47 S. Ct. 702; Sprout v. South Bend, supra, 277 U. S. 169, 170, 72 L. ed. 836, 837, 62 A. L. R. 45, 48 S. Ct. 502]. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic" (pp. 185-186).

(b) A taxpayer must be given the opportunity to show that the tax "bears no reasonable relation to the privilege of using the highways or is discriminatory" (p. 186).

(c) "But since a state may demand of one carrying on an interstate business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the state. Clark v. Poor, 274 U. S. 554; 71 L. Ed. 1199, 47 S. Ct. 702, supra. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses. We need not therefore consider whether the tax exacted from this appellant is unreasonably large or unjustly discriminatory" (p. 190).

(d) A tax based *on carrying capacity of the vehicle* and not on the use made of the highways (190) *does impose a forbidden burden on interstate commerce.* The validity of an exaction for the use of highways "cannot be tested by standards which generally determine the validity of taxes" (190).

It is significant that Article 21 is based on the maximum gross weight of the vehicle. By definition, the maximum gross weight relates to carrying capacity. It cannot be argued that there is a relationship, other than a remote one, between the degree of wear and tear and the 18,000 pound standard. On the contrary, the legislative study and the Manning report demonstrate conclusively that highway damage is caused by vehicles operating with *axle load limits* in excess of 18,000 pounds rather than those over-all maximum gross weight of 18,000 pounds. Furthermore, a carrier who operates in exempt zones pays no tax; a carrier who operates partially in exempt zones and partially in non-exempt zones or exclusively in non-exempt zones pays not only the cost of maintaining the highways over which he operates but the cost of maintaining the highways within exempt zones over which heavy vehicles are operated. Thus, interstate carriers are obliged to pay for the use of highways over which they do not travel. It is palpable, therefore, that the tax is in no wise reasonably related to the use made of the highways. Unless it be demonstrated that there is such a reasonable relationship and that, in fact, the exaction is intended to secure fair compensation for the services rendered by the State, it must fail as an unreasonable and undue burden upon and regulation of interstate commerce. This principle is in no wise altered by the acknowledgment that a tax may be imposed on one class of motor vehicles and not on all carriers. If, as in the case at bar, the tax exacts more than a fair share from interstate carriers, it is invalid.

In *Morf* v. *Bingaman,* 298 U. S. 407, the statute required a payment of a flat fee of $7.50 where a car traveled under

its own power and $5 where a car was towed. The fee was exacted for the privilege of transporting motor vehicles over the State highways for the purpose of sale. The tax was imposed alike on interstate and intrastate vehicles. Exempted from the tax were vehicles licensed by the State and those owned by licensed automobile dealers and operated under dealers' licenses and those operated under special permits issued by the Commissioner of Revenue of the State of New Mexico.

The statute was challenged as imposing an unconstitutional burden on interstate commerce and for violating the due process and equal protection clauses of the Fourteenth Amendment.

The Trial Court concluded that the transportation subject to the tax constituted a distinct class of automobile traffic which caused substantial wear and tear of the highways and caused safety hazards. On the theory that the classification of this type of traffic was effected under the police powers, the State courts held the statute valid. This construction was adopted by this Court. In short, this Court upheld the statute on the ground that the requirement was imposed under the State police power and further that the incidental fee constituted reasonable compensation for the use of the highways. Thus said the Court:

> "As the tax is not on the use of the highways but on the privilege of using them, without specific limitation as to mileage the levy of a flat fee not shown to be unreasonable in amount, rather than of a fee based on mileage, is not a forbidden burden on interstate commerce."

Indeed, the Court equated the tax here as equivalent to a toll, since the tax was "not shown to exceed a reasonable charge for the privilege and defraying the cost of police regulation of the traffic involved such as a State may impose, if non-discriminatory on automobiles moving over its highways interstate".

This Court distinguished this tax from the one involved in *Interstate Transit* v. *Lindsey, supra.* In that case, said the Court, the tax was unrelated to the use of the highways.

The reliance by the Appellate Division upon the decision in *Capital Greyhound Lines* v. *Brice,* 339 U. S. 542, and *Aero Mayflower Transit Company* v. *Board of Railroad Commissioners of the State of Montana,* 332 U. S. 495, was misplaced. In the *Capital Greyhound* case the Court enunciated these governing principles:

(a) *The incidence of the tax* and not the formula employed is determinative of the question of whether it is a permissible exaction of a fair contributive share from interstate carriers (p. 545).

(b) An interstate carrier may challenge a State tax and must be accorded an opportunity to adduce "proper proof" (p. 547).

In that case two taxes were involved. One, a 2% tax on the fair market value of each motor vehicle sold or resold in the State, was imposed upon interstate and intrastate commerce alike. The proceeds were used wholly for road purposes. The second tax was based on mileage, the proceeds of which were likewise used for road privileges.

The appellants challenged the formula but nowhere contended that the amount of taxes exceeded fair compensation (p. 544). The Supreme Court merely reaffirmed the elementary principle that the incidence of a tax, not its label, is the controlling test. Since the tax was, in fact, intended to compensate for road use and since appellants failed to prove that the amount was unfair (or indeed neglected to offer such proof) the tax was valid. In short, the test of fairness was never in issue.

In the case at bar petitioners propose to prove, upon a trial, as they have contended throughout, that the tax is unfair and not reasonably related to highway use.

In *Aero Mayflower Transit Company* v. *Board of Railroad Commissioners of the State of Montana, supra,* the Court considered two taxes imposed by the State: one, a flat fee of $10 for each vehicle operated over the State highways, and, second, a quarterly fee of one-half of one percent of the gross operating revenue derived from operations within the State with an annual minimum fee of $15 per vehicle. The Supreme Court found that the two taxes, though constituting separate and distinct levies, were essentially identical and were designed to exact compensation for the use of the highways. Since the exactions were intended to and did compensate the State for the use of its highways and for the expense of regulating highway traffic, and since they were imposed alike on interstate and intrastate carriers, the statute was upheld.

Article 21, on the other hand, though ostensibly levied alike on intrastate and interstate carriers, falls primarily upon a limited class of interstate carriers, and is, accordingly, unfair and discriminatory.

(B) The zonal exemptions invalidate the tax.

The Appellate Division justifies the exemption of operations within Public Service Commission zones as a proper exercise of power by the Legislature to exempt traffic whose effect on State highways is purportedly small. Here, the Appellate Division relies on the decisions of this Court in *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, and *Hicklin* v. *Coney,* 290 U. S. 169.

Continental Baking Co. v. *Woodring, supra,* involved a statute regulating highway traffic in the interest of safety with incidental provisions for the payment of moderate fees by the users of the highways. There was no claim that the monetary provision discriminated against interstate commerce. The brief of the appellants in this Court did not even refer to the question of interstate commerce.

The attack was based entirely on the due process and equal protection clauses of the Fourteenth Amendment. On review, this Court discussed the problem of classification under the Fourteenth Amendment and pointed out that even though classifications are permitted under the due process and equal protection clauses, the classification would be held invalid if its incidence is such as to discriminate against interstate commerce. Thus, Mr. Chief Justice Hughes said:

> "Requirements of this sort are clearly within the authority of the State which may demand compensation for the special facilities it has provided and regulate the use of its highways to promote the public safety. Reasonable regulations to that end are valid as to intrastate traffic and where there is no discrimination against the interstate commerce which may be affected, do not impose an unconstitutional burden upon that commerce" (pp. 365-366).

The *Hicklin* case, *supra,* similarly involved a regulatory statute with incidental fees for the use of the highways. There was a trial and the statute was attacked on the ground that it violated the due process and equal protection clauses of the Fourteenth Amendment.

In speaking of the attack based on the farmers' exemption this Court, again speaking through Mr. Chief Justice Hughes, said:

> "The state court thus construed the scope, and described the effect, of the exemption in favor of farmers and dairymen: 'Unquestionably, the use by farmers and dairymen for the transportation of farm and dairy products is seasonal and involves only a moderate use of the highways; and the exemption here is further limited by the fact that it can apply only to one whose principal business is that of a farmer or dairyman and not to one merely incidentally engaged in farming or dairying'" (p. 175).

Apart from the fact that the considerations which may justify classifications under a regulatory statute are not applicable to a statute purporting to exact compensation for services rendered by the State, farming conditions in this State are vastly different than they are in Kansas and in South Carolina. Thus, the Court said in the *Continental Baking Co.* case, *supra:*

> "In sustaining the exemption the District Court referred to the factual basis for the distinction. 'The legislature knew,' said the Court, 'that as a matter of fact farm products are transported to town by the farmer, or by a non-exempt "contract carrier" employed by him. The legislature knew that as a matter of fact the use of the highways for the transportation of farm products by the owner is casual and infrequent and incidental; farmers use the highways to transport their products to market ordinarily but a few times a year'" (p. 372).

POINT III

The granting of respondents' motion for judgment on the pleadings and the denial to petitioners of the opportunity to prove their case upon trial deprives petitioners of the due process of law guaranteed by the Fourteenth Amendment.

In granting respondents' motion for judgment on the pleadings and dismissing petitioners' complaint without a trial the New York Courts did not hold that the cause of action set forth in the complaint was not well pleaded. On the contrary, the Courts expressly passed upon the merits of the case and "adjudged and declared that Article 21 of the Tax Law, * * * imposing a highway use tax, is in all respects valid and constitutional * * *" (12). Fur-

thermore, the Court of Appeals, in amending the remittitur, expressly stated:

> "Questions under the Federal Constitution were presented and passed upon by this Court, viz., whether Article 21 of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interestate commerce provision of the Federal Constitution, Article I, Section 8, or the Fourteenth Amendment of the Federal Constitution. This Court held that the aforesaid statute as so construed is not repugnant to the interstate commerce provision or to the Fourteenth Amendment of the Federal Constitution" (124).

Thus, what the Courts of New York have done has been to hold the Ton Mile Tax Law valid and constitutional under the Federal Constitution without a trial. And they have done this in a case where a trial is plainly necessary for the proper determination of the constitutional questions raised. As we have seen above, the validity of the Ton Mile Tax Law depends upon its actual incidence and impact upon the trucking industry in general and upon interstate trucking in particular.* This incidence and impact cannot be determined upon the pleadings, but only upon a trial where detailed evidence of the actual operation of the tax can be presented and weighed. The arbitrary decision of the New York Courts, rendered without a trial and without giving petitioners an opportunity to present evidence of the actual operations of the tax, its impact and incidence, plainly deprive petitioners of due process of law.

This Court has consistently held that it is improper to dispose of constitutional questions that depend upon facts which are not the subject of judicial notice without

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* "In determining whether a tax is within the state's constitutional power, we look to the incidence of the tax and its practical operation, and not its characterization by state courts." *International Harvester Co.* v. *Wisconsin Department of Taxation*, 322 U. S. 435, 441.

granting a trial* upon which evidence of such facts may be elicited. For example, in *Borden's Farm Products* v. *Baldwin*, 293 U. S. 194, this Court reversed a decree dismissing a complaint in a suit to enjoin the enforcement of a State statute on the ground of unconstitutionality and remanded the case for trial. The Court declared (at pp. 204, 210):

> "In view of the peculiar nature and effect of this provision, and of the novel and important constitutional question that it presents, we think that the complaint should not have been dismissed for insufficiency upon its face and that the plaintiff is entitled to have the case heard and decided with appropriate findings by the trial court, unless it satisfactorily appears, upon facts of common knowledge or otherwise plainly subject to judicial notice, that the provision should be sustained as resting upon a rational basis consistent with constitutional right.
>
> * * * * * *
>
> "But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

In the same case Mr. Justices Stone and Cardozo stated in a concurring opinion (293 U. S. at p. 213):

> "We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a

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* For a discussion of the essential requisites of a hearing or trial see *Morgan* v. *United States*, 298 U. S. 468.

demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

Where a State Court or other State agency undertakes to determine such a constitutional question without affording a trial or a hearing to the complainant, the denial of a trial or hearing deprives the complainant of due process of law.

Brinkerhoff-Faris Trust & Savings Co. v. *Hill,* 281 U. S. 673;
Ohio Bell Telephone Co. v. *Public Utilities Commission,* 301 U. S. 292.

In the *Ohio Bell Telephone* case the Pubic Utilities Commission of Ohio made a rate order, challenged by the complainant as confiscatory, not on the basis of evidence in the record but on the basis of alleged facts claimed to have been judicially noticed by the Commission. A decree of the Supreme Court of Ohio affirming the Commission's order was reversed by this Court on the ground that the Commission's action constituted the denial of a fair hearing and deprived the complainant of due process of law. This Court declared (at pp. 300, 301, 302):

"An attempt was made by the Commission and again by the state court to uphold this decision without evidence as an instance of judicial notice. * * * Courts take judicial notice of matters of common knowledge. * * * Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. * * * 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable'. * * * To press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial."

In the case at bar the State Courts actually have dispensed with a trial. They have sustained the validity of a State statute upon the pleadings alone even though the question at issue depended upon facts which could not possibly be determined without a trial. Evidently, the State Courts assumed the existence of facts precluding petitioners' contentions; and such assumption must have been made on the basis of some doctrine such as that of judicial notice. The foregoing authorities plainly establish that this alone—apart from anything else in the case—deprived petitioners of due process of law and requires a reversal of the judgment below.

CONCLUSION

It is respectfully submitted that this case presents questions of profound public interest. The serious constitutional questions involved require a complete review by this Honorable Court. A writ of certiorari should be granted by this Honorable Court so that a full argument of the constitutional questions raised may be had and a judgment directed by this Court in accordance with its interpretation of the constitutional rights involved.

Dated: New York, January 15, 1953.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 552

MID-STATES FREIGHT LINES, INC., *et al.*,
Petitioners,

against

SPENCER E. BATES, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

MID-STATES FREIGHT LINES, INC., *et al.*,
Petitioners,

against

SPENCER E. BATES, ALLEN J. GOODRICH and EDWARD H. BEST, as officers and members of the State Tax Commission, created pursuant to the provisions of Article 8, Section 170 of the Tax Law of the State of New York (Chapter 60 of the Consolidated Law of the State of New York),
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the Special Term of the New York Supreme Court is reported at 200 Misc. 885 (R. 85-97); that of the Appellate Division of the Supreme Court at 279 App. Div. 451 (R. 109-121). The decision of the Court of Appeals for affirmance was without opinion and is reported at 304 N. Y. 700. The subsequent decision of that Court denying reargument and amending its remittitur is reported at 304 N. Y. 788 (R. 123-125).

Statement of the Case

The action herein was commenced in the New York Supreme Court, Albany County, by service of the summons and complaint on or about September 20, 1951 (R. 83). The complaint demanded judgment enjoining the defendants (respondents here) from enforcing the provisions of Article 21 of the New York Tax Law, which had been enacted by Chapter 74 of the Laws of 1951 to become effective on October 1, 1951, and further asked that the statute, which imposes a highway use tax on heavy motor carriers on a weight-distance basis, be declared and adjudged repugnant to the Constitution of the United States in that it violates Article I, Section 8, Clause 3, Article I, Section 10, Clause 2, and the Fourteenth Amendment.*

The complaint, bound into the record opposite page 16, pleads separate causes of action for four types of motor carriers. These, as the petition states (p. 5), include both intrastate and interstate users of the public highways of the State of New York. As affirmed by petitioners' own summary thereof (Pet. pp. 4-6), the complaint basically pleads only the enactment and terms of the Highway Use Tax statute, facts showing that petitioners are subject to the tax imposed thereby and legal conclusions that the statute is "unreasonable, arbitrary and discriminatory", and that it unconstitutionally burdens interstate commerce in violation of specified provisions of the United States Constitution.

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* The petitioners did not, at any time below, advance any argument or authority in attempted support of the pleaded conclusion that the statute violates the clause prohibiting State duties or imposts on imports or exports (Art. I, § 10, cl. 2) nor do they do so here. Consequently, the contention was not passed on by the courts below and no specification of error in this respect is made (Brief, p. 18).

The respondents served an answer which admitted the enactment of Tax Law Article 21 as alleged in paragraph "Fifth" of the complaint and with respect to the further allegations of that paragraph and of paragraphs "Sixth" and "Seventh", all of which plead the provisions and requirements of the statute, respectfully referred the Court to Article 21 itself for the legal effect thereof (R. 18). For the rest the answer joins issue only on the legal conclusions pleaded by petitioners on the face of the statute. It denies only those parts of the complaint containing bare specifications of constitutional objections relied on or stating only legal issues in ultimate conclusory terms.

Respondents then moved for judgment on the pleadings under Rule 112 of the New York Rules of Civil Practice (R. 81). Upon that motion the Court, at Special Term, dismissed the complaint insofar as it sought a permanent injunction and granted judgment declaring the statute valid (R. 11, 12). That judgment was successively affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals (R. 102, 125).

After the service of respondents' motion for judgment on the pleadings, petitioners did not serve any amended complaint as was their right within twenty days under Civil Practice Act Section 244, nor have they at any time moved for permission to amend the complaint. In view of the failure of the complaint to state facts in support of the conclusory allegations of invalidity and the well established burden on those who assail legislative action on constitutional grounds, it is somewhat astounding to find petitioners complaining that the answer contained "no affirmative allegations" controverting the matters alleged in the complaint (Pet. p. 6).

In the Appellate Division the Court addressed itself specifically to the contention there made that there should have been a trial of facts. Observing the principle that facts pleaded in the complaint must be accepted as true, that Court held that the pleadings presented only problems of law to be resolved on the face thereof and not issues of fact (R. 111, 112). The motion in the Court of Appeals, after affirmance by that Court, insofar as reargument was asked, was limited to one point only, whether the granting of the motion for judgment was a "denial of a trial" constituting a denial of due process of law under the Fourteenth Amendment (R. 129). It was fairly conceded that the question of trial had not been expressly identified with the due process clause or couched in "precise constitutional terms" although it was claimed the "clear intendment" of the argument was that a constitutional right had been denied (R. 132). Of course, the holding of the New York courts was not a "denial" of a trial, as petitioners characterize it, but a determination that no triable issues of fact were presented by the complaint and no reference was then or is now made by petitioner to specific allegations of the complaint setting forth any such issues.

The Court of Appeals denied reargument (R. 136). The motion asked, in the alternative, for amendment of that Court's remittitur to show the Federal constitutional questions raised and passed on in order to lay the basis for seeking review by this Court (R. 134). The Court of Appeals was asked to certify that there was presented to it, and necessarily passed upon, a question as to which it held that the granting of the motion for judgment on the pleadings "and the consequent denial to Plaintiffs-Appellants of a trial were in conformity with due process of law and were not in violation of the due process of law clause

of the Fourteenth Amendment" (R. 127). Amendment of the remittitur to this effect was not granted. The Court did, however, grant the motion for amendment to the extent of certifying that there were presented and passed upon the questions "whether Article 21 of the Tax Law of the State of New York, as construed by the Tax Commission, is repugnant to the interstate commerce provision of the Federal Constitution, Article I, Section 8, or to the Fourteenth Amendment of the Federal Constitution" and that validity of the statute under those provisions had been sustained (R. 136, 124). Since it did certify its decision of these Federal questions concerning the validity of the statute involved, it is plain that the Court of Appeals found no due process question before it in connection with the disposition of the issues on the pleadings. It is equally plain that it affirmed the holding of the Court below that petitioners had not set forth in any manner facts creating any occasion for trial rather than mere legal conclusions. The holding was simply that in accordance with the most fundamental requirements for posing factual issues the petitioners had not done so. Thus there could have been no "denial" of a trial in any sense nor is any question of Federal right posed in that respect simply because every question raised by a pleader may be disposed of on the face of his pleading.

Jurisdiction

The petitioners seek permissive review by certiorari under Section 1257, subdivision 3 of Title 28 of the United States Code, claiming both that the validity of a State statute was drawn in question under the United States Constitution and that a "right is claimed" thereunder (Pet. p. 10). The latter doubtless refers to the claim that there

was an unconstitutional "denial" of a trial by the disposition of the case on the motion for judgment. This claim was not advanced in terms of Federal right until the motion for reargument in the highest State Court after its judgment had been rendered. Reargument on that ground was denied as was the requested amendment of the remittitur. It is clear that the claim was not adequately presented to the New York courts and could not have been passed on by them in view of their soundly based decision that only disputed issues of law arose upon the pleadings.

The amended remittitur of the Court of Appeals shows the Federal questions which were presented to and passed on by it (R. 124, 125). It shows that the validity of the statute was upheld against contentions that it was repugnant to the Commerce Clause and the Fourteenth Amendment. It is noted that the petition asks review of the Court of Appeals decision rendered on October 21, 1952 (Pet. pp. 4, 10). That decision merely denied reargument and stated the questions which had been passed on under the United States Constitution. It did not vary or reconsider the judgment on the merits which was rendered on July 15, 1952. The latter determination, it is submitted, is so clearly in accord with a long line of prior decisions of this Court covering every phase of the contentions advanced that no substantial question meriting further review is presented.

The Statute

The enactment of Tax Law Article 21 was prefaced in Chapter 74 of the Laws of 1951 by the ultimate findings of fact upon which the Legislature acted and a statement of its purpose to distribute equitably the financial burden of partially compensating the State for the privilege of using publicly owned highways by heavy vehicles.

Section 1 of Chapter 74 reads as follows:

> "Section 1. The legislature hereby finds and declares that the operation of heavy motor vehicles upon the highways of this state greatly increases wear and damage on such highways; that there is a direct relationship between the weight of the vehicle using such highways and the damage done to them; that the period of usefulness of such highways is shortened by such use; that the effect of such use is to create and augment hazards to pedestrians and other traffic and to impose on the state a heavier financial burden for highway construction, maintenance and policing than does the operation of smaller vehicles; that the provisions of this article are therefore necessary and are hereby enacted to distribute more equitably this financial burden and to compensate the state in part for the privilege granted to such heavy vehicles of using the highways of the state and for the cost of administering state traffic regulations."

The statute, in Section 503*, imposes "a highway use tax for the privilege of operating any vehicular unit upon the highways of this state". While the statute speaks of the "privilege" of operating a vehicle, it is clear that the tax is not a privilege tax as such. The tax is not for the mere permission to use the highways apart from actual use. It is appropriate to speak of privilege inasmuch as any private business use of highways, which are public property, involves a "special and extraordinary" privilege (*Stephenson* v. *Binford*, 287 U. S. 251, 264). The tax itself is, however, a true use tax. It is payable only with respect to actual use and the computation thereof relates it precisely to the actual extent of such use on the bases of weight and distance.

The motor vehicles and vehicular units, to which the statute applies are defined in Section 501, subdivisions 2 and

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* All Sections references are to the Tax Law unless otherwise indicated.

3. Such vehicles cover generally automobiles, trucks and truck tractors, trailers, semi-trailers and dollies, having, either alone or in combination with any other motor vehicles, a gross weight of over 18,000 pounds. Not included are omnibuses and such specialized vehicles, not used to transport goods on the highways and whose use thereof for travel is only casual and incidental, as road rollers, tractor and truck cranes, power shovels, road building machinery, snow plows, road sweepers, sand spreaders and well drillers.

Subdivision 4 defines "gross weight" as the weight of the vehicle itself "plus the maximum load which such motor vehicles may carry". A proviso that gross weight shall not be less than the vehicle's weight plus the manufacturer's rated capacity was stricken out by Chapter 636 of the Laws of 1952, effective July 1, 1952.* It is this gross weight which determines the applicable tax rate except that where a vehicle is operated entirely unladen the tax is computed only upon the actual unladen weight, unless, of course, this is less than 18,000 pounds, in which event no tax is payable (§ 503).

The tax is imposed at rates fixed in a graduated scale correlated to gross weight groups beginning at 6 mills for vehicles in the group between 18,001 and 20,000 pounds and rising for each additional 2,000 pounds thereafter to 24 mills for vehicles over 62,000 and up to the legal limit. The tax is found by multiplying the number of miles operated over the highways of the State by the appropriate weight group tax rate for the gross weight when carrying any load and for the actual weight of the vehicle when unladen (§ 503).

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* Effective July 1, 1953, this definition has been further amended to mean the weight of the motor vehicle plus the weight of the maximum load "to be carried by" such vehicle (L. 1953, c. 6).

The tax was not imposed upon vehicles used exclusively within the limits of any zone established by the Public Service Commission or exclusively within the incorporated limits of any city or village, where the original starting point is located within such zone, city or village and the use is not a part of any journey by such vehicle, either alone or in conjunction with another vehicle beyond the limits thereof (§ 503, subd. 2). The Public Service Commission zones, within which exclusive operations are specifically excepted from tax, are those definite territorial areas set off by the Public Service Commission to identify zones defined in Public Service Law Section 63-i, subdivision 3 (c), as "adjacent to and commercially a part of" any municipality.*

Entirely exempted from Article 21 by Section 504 are vehicular units operating over a rural route and exclusively engaged in contract transportation of the mail, those owned and operated by the United States, this State and its municipalities, or any agency or department thereof and those both "owned and operated by a farmer to transport his own agricultural commodities and products, pulp-wood or livestock, including the packed, processed, or manufactured products thereof, that were originally grown or raised on his farm, lands or orchard, or when used to transport supplies to his farm or orchard that are consumed and used thereon, or when operated by a farmer in transporting farm products from a farm contiguous to his own."

All carriers operating vehicles as defined in the Act must apply for a highway use permit for each vehicle operated by them on the public highways of the State, other than

* Chapter 6 of the Laws of 1953 repeals subdivision 2 of Section 503, effective July 1, 1953, and thus terminates the exemption of vehicle use exclusively within the limits of a city, village of or Public Service Commission zone.

those exempt from the provisions of Article 21. The application must set forth the gross weight of the vehicle and other pertinent information. The permit is issued upon payment of a fee of five dollars with an identifying tag or plate for the vehicle (§ 502).

The Legislative Study Preceding Enactment of the Highway Use Tax

The New York Legislature, from which must come basic statutory authority for highway construction, maintenance, regulation and policing, and which must raise and appropriate funds for the State's direct expenditures and local assistance for highway purposes, has long been familiar with the general problem. Faced in 1949 with the pressing necessity of repairing or reconstructing highways neglected during the war and with the equally insistent demand for greatly expanded highway facilities, it appointed a Joint Legislative Committees on Highways, Canals and Revenues, to investigate revenues which might be raised from highway users for that purpose and submit legislative proposals thereon.

In 1951 the Committee submitted to the Legislature a thorough report of its investigations and conclusions in support of the proposed highway use tax imposed on a weight-distance basis (Legislative Document [1951] No. 67). The report is remarkable for its clearly evident concern to find a tax formula conforming as closely as practicably possible to the facts relating to responsibility for highway costs and relative benefits derived. It was not concerned with merely finding a source of revenue which might be reached or skirting just within the rather broad limits upon the State's power to charge for use of its highways, including that by interstate carriers. It looked to the facts upon which a fairer imposition might be made.

Neither the benefits derived from the highways by non-users and by other classes of users than those subjected to the tax in issue nor the incidence of other levies upon highway users were ignored.

The Committee made a thorough analysis of the existing highway system and its inadequacies for the tremendously increased burden placed upon it principally because of the great growth in size and number of motor carriers. It carefully appraised the costs of the existing system and of improving and maintaining it so that it could accommodate the demands of commerce. Not only were the facts relating to the much greater wear and destructive tendencies of heavy vehicles weighed but it was also found that much more costly design characteristics were required for highways which meet the demands of such vehicles.

The existing highway tax structure was also analyzed and found to bear with disproportionate weight on the lighter vehicles as well as to be inadequate to furnish necessary revenues for highway purposes. It is perfectly evident from the report that there was no thought to throw the whole cost on any selected group. The clear concern of the Legislature was to equalize the compensatory charges the State is permitted to make, for the burden upon it of furnishing highways, without distinction or incidence because interstate transportation is involved in use of New York's highways.

The Proposal for a Weight-Distance Tax

Before proceeding to its specific recommendations for an appropriate and equitable revenue measure the Committee summarized its findings as follows:

"1. New York's present highway-tax structure discriminates against lighter vehicles in favor of the heavy trucks; owners of light trucks, automobiles and farm trucks pay from four to six times as much as the owner of a 40,000-pound truck for the same use of the highway.

"2. Heavily loaded trucks incur greatly increased highway construction and maintenance costs and may be held partially to blame for the present deficient condition of our highways; they fail to pay a reasonable share of the highway costs which may be attributed to them.

"3. New York's present truck taxes are far below the national average in respect to the heavy vehicles but generally are higher than the average for the lighter vehicles.

"4. Out-of-state trucks currently pay little or nothing for the use of New York highways, thus imposing virtually the entire responsibility for highway revenues upon New York vehicles.

"5. The fuel tax is no longer an accurate index of highway use and now discriminates against the lighter vehicles in favor of the heavy vehicles; a heavy truck receives three times as much ton-mileage per gallon of gas as an automobile.

"6. Our present highway tax schedule is not adequate to provide the highway revenues our state soon will need and demand." (Page 65)

The tax proposed to meet these conditions was a weight-distance tax as opposed to a straight ton-mile tax. The former was considered the more equitable because "derived from fair distribution of the responsibility for highway costs". It depends upon a single variable—mileage—in conjunction with gross weight as a constant factor. Because it does not change with every variation in the load being carried it will be more easily administered and enforced. Likewise, the taxpayer's task of keeping records will be simplified. But greater ease of administration was only an additional factor. The "vital consideration" was

that the weight-distance principle assigns tax rates in accordance with highway-cost responsibility (gross weight) and then applies in proportion to actual highway use (mileage).

POINT I

The complaint pleads no triable facts. Only issues of law arose from the pleadings and no question of due process arises from granting judgment thereon in accordance with established practice.

It is significant that petitioners' contentions with respect to the claimed "denial" of a trial make no reference whatever to their own complaint. Since the judicial process deals only with cases and controversies actually presented, it is essential under the most basic procedural requirements that factual issues be framed by one asserting them. Here, as in *Matter of Zorach* v. *Clauson,* 303 N. Y. 161, affd. 343 U. S. 306, it is being asserted that there can be shown on trial matters "that have not even been properly pleaded". Here, indeed, they have not been pleaded at all. Even assuming, as did the New York courts, the truth of the well pleaded allegations of the complaint, no facts are alleged showing any departure from constitutional limits.

The allegations upon which the issues turned are not even "conclusory" facts. They are mere characterizations of invalidity in terms of legal concept. It is required under the New York Civil Practice Act, Section 241, that—"Every pleading shall contain a plain and concise statement of the material facts * * * on which the party pleading relies". A complaint must state facts if legal rights are claimed to turn thereon. General conclusions are not enough *(Gerdes* v. *Reynolds,* 281 N. Y. 180). The New

York Court of Appeals has said that these rules grow out of a purpose "in the interest of fairness and dispatch" to establish a system of pleading under which a party must state his case so that vagueness is avoided and an opponent may be informed of the facts to which he must plead and be prepared to meet (*Kalmanash* v. *Smith*, 291 N. Y. 142).

On a motion for judgment material allegations of fact in the pleading attached are deemed admitted "but not the legal conclusions drawn by the pleader" (*Bogart* v. *County of Westchester*, 270 App. Div. 274, appeal dismissed 296 N. Y. 701). Civil Practice Act Section 244 gives a party a right within twenty days after a motion addressed to a pleading is served to amend his pleading as of course without costs and without prejudice. Thus, a second chance is offered to present facts and be heard upon them. That opportunity was never availed of nor is there yet more than the vaguest suggestion of what petitioners would have tried.

The New York rules are not peculiar and overexacting local stringencies (Cf. *Brown* v. *Western R. of Alabama*, 338 U. S. 294), and certainly it cannot be said that this complaint has been hypercritically read. This Court has held that allegations "in general language" asserting repugnance to constitutional provisions do not set forth facts sufficient to show invalidity (*Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440). This is not a case involving legislative action of "peculiar nature and effect" and without close precedents (Cf. *Borden's Co.* v. *Baldwin*, 293 U. S. 194). Here State power to charge for use of publicly owned highways is fully established and there are square precedents upon each phase of the statute involved.

The presumption of constitutionality and, more specifically, of the existence of sustaining facts imposes on the

assailant the burden of showing legislative action to be baseless. "The burden is not sustained by making allegations which are merely the general conclusions of law or fact. * * * Facts relied on to rebut the presumption of constitutionality must be specifically set forth" *(Pacific States Co.* v. *White,* 296 U. S. 176, 185).

> "The burden is on the plaintiff by candid and direct allegations to set forth in its complaint facts sufficient plainly to show the asserted invalidity".
>
> *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249, 255.

It has long been judicially settled that questions of fact relating to the basis for legislative action are for the legislature and that the existence of sustaining facts will be presumed if they are rationally conceivable. These principles apply fully to classification issues in the exercise of a State's undoubted power to exact reasonable charges for use of its highways including that by vehicles moving interstate. In *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, it was distinctly said that, in passing on the validity of classification for that purpose "it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis."

The New York courts did not merely dismiss the complaint herein for a technical defect in pleading. They adjudicated the issues of law raised as to the validity of the statute on its face. In accordance with the nature of the action as brought by the petitioners for declaratory judgment as well as injunction, the validity of the statute was

adjudged and declared. Petitioners cannot now protract the matter by seeking to evolve a denial of a federal right to be heard from the barrenness of their own complaint.

POINT II

The highway use tax is not an unconstitutional burden on interstate commerce.

In a long series of prior decisions from *Hendrick* v. *Maryland*, 235 U. S. (1915) 610, through the intervening cases* to *Capitol Greyhound Lines* v. *Brice*, 339 U. S. (1950) 542, this Court has uniformly held that a state may, consistently with the interstate commerce clause, lay a tax upon the use or privilege of using its highways as compensation for the cost of constructing, maintaining and policing them.

As early as 1926, in *Clark* v. *Poor*, 274 U. S. 554, the Court deemed the question "settled" and said, further, that:

> "Common carriers for hire, who make the highways their place of business may properly be charged an extra tax for such use."

In 1935 the decisions were said to "apply a closure to debate" (*Aero Mayflower Transit Co.* v. *Comm'n*, 295 U. S. 285, 289), and in 1947 it was said to be "far too late to question that a state, consistently with the commerce clause, may lay upon vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable non-discriminatory tax as compensation for use of its highways" (*Aero Transit Co.* v. *Comm'n*, 332 U. S. 495).

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* See list annexed to Mr. Justice Frankfurter's dissenting opinion in *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542.

The basic consideration has been the proprietary interest of the State in the highways which it constructs and furnishes at its own expense, an interest giving it power to protect them, by restriction or prohibition, from dangerous and destructive use by heavy vehicles *(Morris* v. *Duby,* 274 U. S. 135; *Stephenson* v. *Binford,* 287 U. S. 251; *South Carolina Hwy. Dept.* v. *Barnwell Bros.,* 303 U. S. 177). Where the state chooses, instead, to aid and foster commerce by making its highways adequate to the need, its power to exact a compensatory charge is undoubted.

The limitations imposed are only that the tax shall actually be for the privilege of road use rather than the privilege of doing an interstate business, that it shall not discriminate against interstate commerce and shall not exceed reasonable compensation to the state for the privilege granted *(Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542). The Court has not been insistent upon scientific accuracy in prescribing the formula for such a tax. It must affirmatively appear from the scope and language of the statute that the charge is exacted as compensation *(Dixie Ohio Co.* v. *Comm'n,* 306 U. S. 72). In the earliest case it was said, however, that "the amount of the charges and the method of collection are primarily for determination by the State itself" *(Hendrick* v. *Maryland,* 235 U. S. 610; see also *Kane* v. *New Jersey,* 242 U. S. 160, 168). The Court has sustained flat fees on the ground that they were for the privilege of use rather than on use itself and were not shown to be unreasonable in amount *(Morf* v. *Bingaman,* 298 U. S. 407, 412).

The Court has held that charges must be determined by their result rather than their formula and must stand unless proven to be unreasonable in amount *(Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542). Reference was made

to the many forms which taxes theretofore sustained had taken, such as those based on mileage, chassis weight, tonnage capacity, or horsepower "singly or in combination" (p. 544). In expressing his disapproval of the measure sustained by the majority in that case (fair market value of vehicles), Mr. Justice Frankfurter, nevertheless, gave an illuminating analysis of the tax bases which were established as valid. While the tax must be justified as "a means of securing compensation for the road use which the State affords and for which it may exact a return" the State is not held to more than a "loose judgment in fixing a *quid pro quo*". "Thus," he said:

> "tax formulas dependent on actual use of the State's highways satisfy the constitutional test, without more, since they reflect an obvious relationship between what is demanded and what is given by the State. Taxes based on miles or ton-miles have encountered no difficulty here. *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352." (p. 550)

In the light of the specific incidence of the New York tax on actual highway use, of the statutory declaration that it is levied to compensate the State "in part", and of the adjustment of the charge to relative use, benefit and responsibility determined upon careful legislative investigation, no claim may well be made that it is arbitrarily imposed as a source of general revenue or that it is excessive with relation to the privilege and use for which it is charged. Its impact can only be on use of highways within the State and in exact relation to that use. It is far more plainly identified as a charge for highway use than the tax recently sustained in *Bode* v. *Barrett*, Nos. 187 and 274—October Term, 1952, February 9, 1953.

The New York tax in issue so clearly meets the basic conditions under which a charge may fall on interstate

users of its highways that argument thereon would seem foreclosed. There are no assertions in the complaint or elsewhere that the amount of the tax is beyond the value to petitioners of the use made of the highways. There is no effort to show that the charge has no rational relation to the cost to the State of furnishing ways vital to their needs. The most optimistic estimates of the yield of the tax do not represent more than a small fraction of what the State has spent and will have to spend. In the light of the strong basis for the conclusion that costs are greatly increased beyond the demands of general traffic to furnish highways adequate for heavy carriage there is no room for any contention that the charge is not compensatory with respect to the rates at which it is fixed. So far as appears, the attack is mainly directed to picking at those particular provisions by which the Legislature, in an effort more conscientious than the scope of its power would require, has sought to adjust its charge upon a fair and equitable basis, even at the expense of desirable administrative simplicity.

Where a State has power over the subject matter, such as it has to regulate or charge for use of its highways consistently with the interstate commerce clause, that provision does not deprive it of the right to classify and select in fashioning its requirements in accordance with the conditions which give rise to them. The limitations of the commerce clause do not require "that regulation must reach every class to which it might be applied—that the legislature must regulate all or none" (*Sproles* v. *Binford*, 286 U. S. 374, 396). So long as distinctions are not aimed at interstate commerce as such the question is still "whether the classification lacks a rational basis" (p. 396).

In *Hendrick* v. *Maryland*, 235 U. S. 610, it was said with respect to the horsepower ratings there involved, "Distinctions amongst motor machines and between them and other

vehicles may be proper—essential indeed—and those now challenged are not obviously arbitrary or oppressive". In *Aero Transit Co.* v. *Comm'rs,* 332 U. S. 495, the Court recognized the "especially ardous use of roadways" by heavy truckers and held that while a state might not discriminate against interstate traffic this did not mean "that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects."

It is clear that this Court does not consider classification to be a "meaningless concept" (Brief, p. 20) in measuring a State's exercise of the power to make a compensatory highway charge. The following statement from *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 593 completely answers that claim:

> "It is no longer open to question that the states have constitutional authority to exact reasonable fees for the use of their highways by vehicles moving interstate, *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Clark* v. *Poor,* 274 U. S. 554; *Sprout* v. *South Bend,* 277 U. S. 163; *Morf* v. *Bingaman, supra; Dixie Ohio Express Co.* v. *State Revenue Comm'n, ante,* p. 72, and that for that purpose they may classify the vehicles according to the character of the traffic and the burden it imposes on the state by that use, and charge for the use a fee not shown to be unreasonable or excessive. *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370-371; *Hicklin,* v. *Coney,* 290 U. S. 169; *Morf* v. *Bingaman, supra,* 413; *Dixie Ohio Express Co.* v. *State Revenue Comm'n, supra.*"

Nor has the Court found any such cleavage between classification for purposes of regulation and of fixing charges as petitioners urge. The test is reasonableness in either case. The most that can be said is that "the character of the traffic and the burden it imposes on the State" are the

relevant considerations. A valid classification on this basis is none the less so because it affects interstate commerce even to a degree far in excess of any here discernible (see *Morf* v. *Bingaman*, 298 U. S. 407).

Time and again the Court has sustained highway use or privilege taxes levied on particular classes of traffic and not extended to others with the admonition that such classification is a legislative function, as to which the Court may only determine whether it is possible to say that it is without rational basis. Failing this, such classification must stand and will satisfy the commerce clause equally with the Fourteenth Amendment (*Morf* v. *Bingaman*, 298 U. S. 407; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583; *Dixie Ohio Co.* v. *Comm'n*, 306 U. S. 72; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Eavey Co.* v. *Dept. of Treas. of Indiana*, 216 Ind. 255; 24 N. E. 2d 268, app. dism. for want of substantial federal question, 310 U. S. 611).

POINT III

The highway use tax imposes no unequal or discriminatory burden.

In a tax levied upon actual use of highways in accordance with weight of vehicles the incidence of the levy cannot be disproportionate to the use. Such use and the corresponding burden on the State are the valid bases of the tax.

There is no token on the face of the statute or perceivable effect in its operation, disclosing any intention to discriminate against interstate commerce or impose any burden not borne equally by intrastate traffic of the same class. The levy applies exclusively to use of highways within the State by particular classes of vehicles and operators

whether or not the operation be part of an interstate transaction (*Aero Transit Co.* v. *Comm'rs*, 332 U. S. 495, 503). Interstate carriers are equally affected by the classifications and exemptions. Intrastate traffic is equally subject to the tax.

In framing its levy the Legislature gave careful regard to the relevant facts so as to bring about a more equitable distribution of the total highway-user taxes. The record shows that it was not its intention to impose the whole cost on highway users. It was aware of the benefits to the general public and also of the contributions it already made. Neither did it wish to spread the burden of needed additional highway revenues over the whole of the user class in the clear light of its findings that the lighter vehicles and passenger cars already bore a disproportionate weight. The tax was devised to bear upon the heavier over-the-road class of property carreirs. If a larger ratio of the interstate users than intrastate carriers come within that category, it is because interstate carriage more largely involves that type of use. The considerable amount of heavy carriage which does not go beyond the State is equally taxed. The basis of the classification is solely upon a character of road use necessitating greater public expenditure for and deriving greater benefit from the highway system. These were a responsibility and corresponding benefit out of all proportion to any road use charge then being made, and in the case of the interstate carrier even such charges could and were likely to be altogether escaped. Every relevant consideration affirmatively indicates that the tax has no forbidden incidence upon interstate commerce.

I. The limitation to vehicles over 18,000 pounds

There has been ample judicial notice of the greater damage done to highways by the giant motor carriers in modern use and of the corresponding necessity of building highways far beyond the needs of general traffic if they are to be accommodated. Size and weight have long been relevant factors in determining the compensatory charge a State is permitted to make for use of its highways. As long ago as the *Hendrick* case (235 U. S. 610) the Court noticed the insistent demands upon the states for better highway facilities and the justice of imposing charges upon those for whose needs they are essential. In *Hicklin* v. *Coney*, 290 U. S. 169, 173, the Court observed that carrying capacity and the size and weight of trucks "unquestionably have a direct relation to the wear and hazards of the highways". And in *Aero Transit Co.* v. *Comm'rs*, 332 U. S. 495, the Court said that "particularly truckers of heavy goods, * * * make especially arduous use of roadways, entailing wear and tear much beyond that resulting from general indiscriminate public use".

As the *Hicklin* case makes clear (290 U. S. 169, 173), a State may impose reasonable limitations upon any use of its highways with respect to weight and size. It may, therefore, adjust its fees for use of the highways upon the same basis. Where the State chooses to keep the ways of commerce open and to build them sufficient for the demands made upon them surely it can key a charge for actual use to the additional expenses made necessary by heavy carriage.

Weight is an obvious factor and it is well established that fees may be graduated "according to the propensities of the vehicles to injure or destroy the public highways, and may exempt those with respect to which this tendency

is slight or nonexistent'' (*Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73). The Legislature may draw the line and it has great latitude whether it shall be done by weight of vehicle alone as in the *Carley & Hamilton* case, by gross weight (*South Carolina Hwy. Dept.* v. *Barnwell Bros.*, 303 U. S. 177), or net load (*Sproles* v. *Binford*, 286 U. S. 374).

Here the avowed purpose was to equalize the burden on highway users by apportioning a more appropriate part to the heavy vehicles. Detailed results of observation and tests were before the legislative Committee with respect to damage propensities and necessary extension of designed capacities with respect to vehicle weights. There was evidence that a single axle loading of 18,000 pounds approached the practical limits of economical construction and maintenance. This meant, of course, that distribution of load permitted greater gross limits but it clearly suggested 18,000 pounds as a gross weight at which responsibility for roads beyond those suitable for general traffic began and where relative benefit supported a compensatory charge. Little doubt attends the graduation of such a charge according to weight. There is equal right to fix the point by weight below which the tax would fail in its equalizing purpose (see *State* v. *Evans-Terry Co.*, 173 Miss. 526, 159 So. 658, aff'd on motion *sub nom. Evans-Terry Co.* v. *Mississippi*, 296 U. S. 538, rehearing denied, 663). In view of that purpose and the obvious relationship thereto of a weight criterion, there is no basis for finding that the place where the Legislature determined to draw the necessary line resulted in an arbitrary classification.

Petitioners say they do not object to the 18,000 pounds basis "as a formula'' but claim a design is instinctive in it to burden interstate commerce. Aside from the absurdity of implying that trucks of 18,000 pounds gross weight are not extensively used in intrastate operations, we must

again point out the clear relation of that criterion to heavy usage of the highways and the augmented burden on the State of furnishing roads adequate therefor in terms of which the tax was devised.

While axle loading may have direct bearing on regulations limiting use of the highways, it is not so directly relevant to fixing a compensatory charge as gross weight. Not only must immediate damage be taken into account but the requirements of road width, sight distances, degree of curves and other things are also relevant in furnishing and maintaining roads adequate for heavy, fast moving trucks and safe both for themselves and the general public. To these overall size as reflected in gross weight is directly relevant and correlation of these factors was for the Legislature's judgment.

II. The exception of omnibuses

The principal consideration in excepting omnibuses was their existing liability to a gross receipts tax which is imposed by Tax Law, Section 186-a. In *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, (and on remission by this Court, 298 N. Y. 876), it was established that the tax might be validly applied to interstate carriage of passengers if apportioned according to mileage within and without the State. By Laws of 1951, chapter 601, effective July 1, the statute was amended, following this decision, to make certain that it applied to carriage into or out of the State on a mileage basis. The measure of the tax, therefore, has a clear relation to use of the highways both as to local and interstate carriage.

Aside from the obvious differences between transportation of persons and of goods, the incidence of another tax on highway use is good ground for excepting the former.

In *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245, objection to a mileage tax on buses was made because it applied in terms only to interstate transportation of persons. The Court found, however, that it was complementary to a gross earnings tax only applicable to intrastate buses and overruled the objection, despite the obvious differences in the two types of tax.

Wholly aside from this consideration, sufficient of itself, there are other grounds for distinguishing passenger carriage. These have been expressed in *Sproles* v. *Binford*, 286 U. S. 374, 396, as follows:

> "We do not think that it can be said that persons and property, even with respect to their transportation for hire, must be treated as falling within the same category for purposes of highway regulation. The peculiar importance to the State of convenience for the transportation of persons in order to provide its communities with resources both of employment and of recreation, the special dependence of varied social and educational interests upon freedom of intercourse through safe and accessible facilities for such transportation, are sufficient to support a classification of passenger traffic as distinct from freight."

The Court has sustained against equal protection and commerce clause objections taxes imposed on carriers for hire as against those hauling not for hire; a length to which this statute does not go, on the ground that differences justifying the classification are readily discernible (*Dixie Ohio Co.* v. *Comm'n*, 306 U. S. 72, 78). *Morf* v. *Bingaman*, 298 U. S. 407, and *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, in which taxes were sustained which singled out vehicles transported on their own wheels for sale as the subject of highway use charges, indicate that an exception of omnibuses does not even approach the settled limits of the power of classification.

III. The exception relating to farmers

Continental Baking Co. v. *Woodring*, 286 U. S. 352, involved objections by a private motor carrier of its own goods to a highway use tax computed upon gross ton miles. Among the objections was one to the exemption of "the transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle". The Court pointed out that this was not a distinction based merely on the kind of goods transported by carriers for hire of the kind involved in *Smith* v. *Cahoon*, 283 U. S. 553, where no justification could be found for discrimination between carriers in the same business because one carried one kind of goods and another a different category in the course of that business. It held the distinction of farmers transporting their own goods and supplies to be of a different sort. The latter use of the highways the Legislature knew, was casual and infrequent and incidental. The practical difference between a farmer's use of the highways and that by even a private carrier using them regularly in connection with other types of business was found obvious and sufficient to support the exemption.

The *Continental Baking* case was relied on in *Hicklin* v. *Coney*, 298 U. S. 169, to support an exemption for farmers found to be less limited inasmuch as it might permit them occasionally, though not as a regular business, to transport farm or dairy products for compensation. Moreover, the *Hicklin* case held that an exemption in favor of those hauling logs to shipping points related to a limited class of transportation and was not unreasonable. A broader exemption of transportation of farm products, even though not in the owner's vehicle, so long as title remained in the producer, was sustained in *Aero Transit Co.* v. *Georgia Comm.*, 295 U. S. 285. There the court said that measures ameliorating the lot of the farmer and fostering agriculture could not

be said to be an arbitrary preference under the Fourteenth Amendment. (See also *State* v. *Evans-Terry Co.*, 173 Miss. 526, 159 So. 658, aff'd on motion *sub nom. Evans-Terry Co.* v. *Mississippi*, 296 U. S. 538, rehearing denied, 663; *Pure Oil Co.* v. *Oklahoma Tax Commission*, 179 Okl. 479, 66 P. 2d 1097, app. dism. for want of substantial federal question, 302 U. S. 635.)

We think it clear that a tax, designed to equalize the cost to be borne by heavier carriers whose business involves constant pounding on the roads, who need a strong and extended system of through routes and who derive a direct benefit therefrom, need not be laid upon the occasional use of the highways incidental to the distinctive occupation of farming. The exemption has a plainly rational basis.

IV. The exemption of transportation exclusively within a city, village or commercial zone

There would seem to be little need to justify the right of the Legislature to exempt transportation confined wholly to a city or village or a commercially adjacent zone* from a tax properly aimed at obtaining a commensurate payment from heavy over-the-road carriers. Operations solely within such municipalities and adjacent areas will normally be engaged in by those having established places of business therein. They will be persons or firms subject to regulation and to general taxation and special local assessments within such communities, from which the cost of streets and partly, at least, of secondary highways are

* If it be the fact that these comprise 50% of highway mileage the exemption is accorded only for use exclusively within a municipality or zone. Travel within such zones as part of use going outside them is not exempt and 50% does not represent the proportion of exempt highway use. As previously noted, this exemption has been repealed, effective July 1, 1953 (L. 1953, c. 6).

paid. Their operations will principally involve use of municipal streets and local roads. Only incidentally will they use the State highways. They neither require an extensive system of heavily built roadways nor derive the proportionate benefit therefrom of the great through vehicles.

It was upon such considerations that the Court rejected objections to a similar exemption in *Continental Baking Co.* v. *Woodring*, 286 U. S. 352. It said that exemption of carriers operating wholly within a city or village had "an obviously reasonable basis as such operations are subject to local regulations". In protecting its highway system the State was held to be at liberty to leave its local communities unembarrassed and not bound either to override them or impose burdensome additions.

With respect to zones contiguous to municipalities, the Court found equally proper basis for an exemption. There the exemption was granted with respect to private carriers having an established place of business within a city or village to extent of a zone having a radius of twenty-five miles beyond the municipal limits. The extent to which this broadly granted exemption exceeds the narrower limitation in the New York Act to zones established as a matter of fact to be "commercially adjacent" is clear from the Court's opinion sustaining it:

> "The first question is whether the State, in legislation of this sort, may provide for such carriers an exempt zone contiguous to its municipalities. We find no difficulty in concluding that it may. As the District Court pointed out, there 'is a penumbra of town' that is outside municipal limits, and delivery trucks of those having establishments within the municipalities, in their daily routine repeatedly cross these limits 'in going back and forth into these outlying additions.' The

court found that trucks of that class 'use the state improved highways but slightly, for the streets of these outlying additions are not generally a part of the state system.' The District Court also directed attention to the fact that 'the practical difficulty of keeping track of the mileage of such delivery trucks as they cross back and forth is well-nigh insuperable' and that 'the revenue to be gained from such use would be insignificant and the cost of collection large.' We think that the legislature could properly take these distinctions into account and that there was a reasonable basis for differentiation with respect to that class of operations. In this view, the question is simply whether the fixing of the radius at twenty-five miles is so entirely arbitrary as to be unconstitutional. It is obvious that the legislature in setting up such a zone would have to draw the line somewhere, and unquestionably it had a broad discretion as to where the line should be drawn. In exercising that discretion, the legislature was not bound to resort to close distinctions or to attempt to define the particular differentiations as to traffic conditions in territory bordering on its various municipalities, Ohio Oil Co. v. Conway, 281 U. S. 146, 159." (p. 370)

Any discussion of zonal exemptions must take account of *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, which involved a California highway use charge upon transportation of vehicles upon their own wheels or in tow for purpose of sale within or without the State. The statute divided the State into two zones which were "approximately the northern and southern halves" thereof and excepted such vehicles moving wholly within either of such zones. A claim a discrimination because of this exception was rejected by the Court as follows:

"So far as appellees complain that no fee is exacted for cars which move for sale intra-zone in caravans, different considerations apply. As we have said, it is the long haul of cars for sale which has produced

> motor vehicle caravans and has made them a special class for the purposes of regulation and imposition of fees. It was for the legislature to consider and decide whether the actual conditions which prevail in the state, affecting movement of cars for sale, eliminate or so reduce the burden of the caravan traffic on the highways as to call for a different classification of the short haul traffic for the purposes of regulation and fees. The legislature having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it is without any substantial basis. *Carley & Hamilton* v. *Snook*, 281 U. S. 66, 73; *Continental Baking Co.* v. *Woodring*, *supra; Sproles* v. *Binford*, 286 U. S. 374; *Hicklin* v. *Coney*, *supra; Aero Mayflower Transit Co.* v. *Public Service Comm'n*, 295 U. S. 285." (p. 596)

Here, as we have said, there is a much more limited and carefully drawn zonal exemption with every reason heretofore discerned by the courts to support such exemptions available to sustain its rational character. Much broader was the exemption under a tax limited to "inter-city" carriers in *Pure Oil Co.* v. *Oklahoma Tax Commission*, 179 Okl. 479, 66 P. 2d 1097, as to which this Court dismissed an appeal for want of a substantial federal question (302 U. S. 635).

Conclusion

The tax involved by its nature and necessary incidence is clearly a charge upon use of highways furnished by the State. It is devised to impose a fairer share of the cost of building, maintaining and regulating those highways having a sensible basis in the use made of them and the burden thus imposed upon the State to furnish ways indispensable to the heavy carriage carried on over them. In the strong light of the Court's prior decisions nothing has been shown

to raise any question that the statute exceeds settled constitutional bounds. It is respectfully submitted that no substantial question meriting further review is presented.

Dated: Albany, New York, February 14, 1953.

Respectfully submitted,

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